

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2015-44**

April 10, 2015

VIA ELECTRONIC MAIL

Mr. Will Sommer

RE: FOIA Appeal 2015-44

Dear Mr. Sommer:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 (“DC FOIA”). In your appeal, you assert that the Office of the City Administrator (“OCA”) improperly withheld records you requested under the DC FOIA.

Background

On January 13, 2015, you submitted a request under the DC FOIA to OCA seeking “all emails and attachments contained in . . . [a list of email accounts] that relate to the D.C. United stadium project and land negotiations with Akridge.” The OCA provided you with responsive records, some of which were partially redacted pursuant to an assertion of the deliberative process privilege exemption under D.C. Official Code § 2-534(a)(4).

On appeal, you challenge OCA’s response to your request, contending that some of the redacted emails cannot constitute interagency communications because they were either produced by, or sent to, a lawyer, who is not an employee of the District.

The OCA responded to your appeal by email to this office on April 10, 2015. Therein, the OCA explained the role of the named lawyer as a contracted consultant, specifically hired to advise and consult the District in matters of real estate development and construction procurement. In support of this position, the OCA attached both (1) a copy of the named lawyer’s contract with the District, and (2) a former DC FOIA appeal decision (No. 2013-11R) that found the same named lawyer’s communications to be protected by the deliberative process privilege.

Discussion

It is the public policy of the District of Columbia that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” *Id.* at § 2-532(a). The right created under the DC FOIA to inspect public records is

subject to various exemptions that may form the basis for denial of a request. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

D.C. Official Code § 2-534(a)(4) (“Exemption 4”), vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” One of the privileges that falls under the umbrella of Exemption 4 is the deliberative process privilege.

The deliberative process privilege protects agency documents that are both predecisional and deliberative. *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A document is predecisional if it was generated before the adoption of an agency policy and a document is deliberative if it “reflects the give-and-take of the consultative process.” *Id.*

The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency . . .

Id.

As we explained in DC FOIA Appeal No. 2013-11R, communications with parties outside of the government may still qualify as “inter-agency” communications for the purposes of the deliberative process privilege. *E.g. Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001).

When interpreted in light of its purpose, . . . the language of Exemption [4] clearly embraces this situation. The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

Nat’l Inst. of Military Justice v. U.S. Dep’t of Def., 512 F.3d 677, 680 (D.C. Cir. 2008) (quoting *Ryan v. Department of Justice*, 617 F.2d 781 (D.C.Cir.1980))

However, communications from consultants are not considered inter-agency communications when they are made by “an interested party seeking a Government benefit at the expense of other applicants.” *Klamath Water Users Protective Ass'n*, 532 U.S. at 12.

The analysis here is almost identical to Appeal No. 2013-11R, and is not “novel” as you suggest in the text of your appeal. It is true that as you pointed out, many of the responsive documents that were redacted by OCA were either produced by or sent to a lawyer with a non-government email address. From this you conclude that the communications “definitely don’t fall under deliberative process privilege.” However, the appropriate analysis here is not so conclusory.

As discussed above (and in Appeal No. 2013-11R), non-government entities’ communications may still qualify as inter-agency communications, so long as the interests of the nongovernmental consultants are aligned with the government’s and not in competition with a third party. *Klamath Water Users Protective Ass'n*, 532 U.S. at 12. Here, OCA has represented that the named attorney is, and has been, contracted with the District to provide predecisional advice to the District for capital construction and renovation programs. In support of this assertion, OCA has provided this office with a copy of the lawyer’s firm’s contract with the District. Further, OCA has directed this office’s attention to Appeal No. 2013-11R, in which the same firm’s communications were determined to be protected by the deliberative process privilege.

In reliance of OCA’s representations, it is the opinion of this office that the communications in question concern matters within the scope of the lawyer’s contract as an advisor for the District. As a result, we must determine that the named lawyer is a consultant not excluded by *Klamath Water Users Protective Ass'n*, and that his communications with the District may be treated as inter-agency communications exempted under the deliberative process privilege under Exemption 4.

Conclusion

Based on the foregoing, we UPHOLD the OCA’s decision. This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Gregory Evans

Gregory Evans
Associate Director
Mayor’s Office of Legal Counsel

cc: Barry Kreiswirth, General Counsel, OCA (via email)